IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34796

THE EDWIN RECTOR 1995 CHARITABLE TRUST, EDWIN RECTOR, trustee,	)	**2008 Unpublished Opinion No. 713**
	)	**Filed: November 26, 2008**
Plaintiffs-Respondents,	)	**Stephen W. Kenyon, Clerk**
v.	)	**THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**
MARK HALL,	)	
Defendant-Appellant.	)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Ronald E. Bush, District Judge.

Order granting summary judgment, affirmed.

Mark Hall, Pingree, pro se appellant.

Jonathon S. Byington of Racine, Olson, Nye, Budge & Bailey, Chtd., Pocatello, for respondent.

PERRY, Judge

Mark Hall appeals from the district court's order granting summary judgment to the Edwin Rector 1995 Charitable Trust and Edwin Rector, trustee, (the trust). For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Hall owned several mobile homes, and the tenants of those mobile homes had signed rent-to-own contracts to purchase the homes from Hall. In 2005, Hall sold eight of the mobile homes and their rent-to-own contracts to the trust. Hall signed a personal guarantee, which provided that he would pay any of the monthly payments on the rent-to-own contracts that were thirty days or more overdue.

In September 2006, the trust filed a complaint alleging, among other things, that several of the tenants were more than thirty days overdue on their rent-to-own payments, that the trust

had demanded payment from Hall pursuant to the personal guarantee he signed, and that Hall refused to make the payments. The trust sought $11,300 that was unpaid on the rent-to-own contracts and $1,979.92 in interest. In November 2006, Hall filed a pro se answer. The trust filed a motion for summary judgment on July 27, 2007. In support of the motion for summary judgment, the trust submitted two affidavits. Hall filed several additional pro se motions in the interim, including a motion to change venue on July 27, 2007, and a pro se motion to dismiss or strike summary judgment on August 6, 2007. The district court entered an order denying Hall's motion for a change of venue. A summary judgment hearing was held before the district court on September 18, 2007. The day before the summary judgment hearing, Hall filed two affidavits detailing several physical and mental disabilities he was afflicted with.

The district court determined there was no genuine issue of material fact and granted summary judgment in favor of the trust. The trust moved for an award of $7,634 in attorney fees pursuant to I.C. § 12-120. Hall sought a more specific accounting of the attorney fees and served interrogatories on the trust. The trust answered Hall's interrogatories. Hall continued to file pro se motions, including, motions to stay proceedings pending appeal; a motion to postpone all legal proceedings while Hall was out of the area; several affidavits; an amended motion to change venue; a motion for the court to accept his pleadings and other documents by fax; a motion to combine motions; a motion to provide auxiliary aids; and a motion for trial. From the record, it appears that a hearing was held on Hall's motions on November 1, 2007. A transcript from that hearing has not been included in the record on appeal. Additionally, based on the district court's minute entry and order resulting from that November 1 hearing, it appears that another hearing was held on December 18, 2007, to further address the trust's request for attorney fees. The transcript from that December 18 hearing is also not included in the record on appeal. Nevertheless, it appears that the district court awarded attorney fees to the trust. Hall appeals, contending the district court erred in granting summary judgment and asserting a variety of additional claims.

II.
STANDARD OF REVIEW

We first note that summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. On appeal, we exercise free review in determining whether a genuine issue of material fact exists

and whether the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986). When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct. App. 1992). The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000). Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders*, 125 Idaho at 874, 876 P.2d at 156.

The United States Supreme Court, in interpreting Federal Rule of Civil Procedure 56(c), which is identical in all relevant aspects to I.R.C.P. 56(c), stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (citations omitted). The language and reasoning of *Celotex* has been adopted in Idaho. *Dunnick*, 126 Idaho at 312, 882 P.2d at 479.

III.

ANALYSIS

In addition to appealing from the district court's order granting summary judgment to the trust, Hall's pro se brief includes a variety of other claims. We will address Hall's claims accordingly.

A. Summary Judgment

The only two arguments contained in Hall's appellate brief that relate to the district court's order granting summary judgment are that the district court abused its discretion pursuant to I.R.C.P. 56(f) and that Hall does "have material issues of fact in this case." The trust counters that the district court properly exercised its discretion in denying Hall's request for additional time at the summary judgment hearing and that Hall has not raised a genuine issue of material fact--nor do his untimely affidavits raise a genuine issue of material fact.

Idaho Rule of Civil Procedure 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In this case, the trust filed suit against Hall in September 2006 and filed a motion for summary judgment on July 27, 2007. The hearing on the motion for summary judgment was held on September 18, 2007. Idaho Rule of Civil Procedure 56(c) provides that Hall, if he desired to do so, was required to serve affidavits at least fourteen days before the hearing. *See* I.R.C.P. 56(c). However, Hall filed two affidavits the day before the hearing.

Although not entirely clear from his brief, presumably Hall is arguing that the district court abused its discretion pursuant to I.R.C.P. 56(f) by not granting him a continuance because he was unable to timely present facts in opposition to the motion for summary judgment due to his various disabilities. However, I.R.C.P. 56(f) provides that summary judgment may be denied or a continuance ordered if the party opposing the motion provides *in its affidavit* the reason why facts essential to opposing the motion for summary judgment cannot be obtained. Because Hall did not provide a timely affidavit, there is no admissible evidence showing that he could not present facts essential to opposing the motion. Therefore, we conclude the district court did not abuse its discretion pursuant to I.R.C.P. 56(f).

Furthermore, even though Hall's appellate brief summarily concludes that he has raised a genuine issue of material fact, Hall does not enlighten this Court as to what that genuine issue of fact is or how it was raised. All of the arguments in Hall's brief, as well as the facts in his untimely affidavits, discuss his disabilities. Nowhere in the record does Hall deny that he sold the rent-to-own contracts to the trust, that some of the tenants were behind in their payments, or that he signed a personal guarantee concerning those payments.

In granting the trust's motion for summary judgment, the district court concluded:

> Now, in this case, there is an affidavit from Mr. Rector and an affidavit from [the trust's attorney] that reports the sworn testimony of Mr. Hall and other documents, all of which establish the fact of a series of so-called rent-to-own contracts, by which certain individuals were purchasing mobile motor homes making monthly payments upon the same. They also established the fact that Mr. Hall had personally guaranteed the obligations of those rent-to-own purchases.
>
> They established the fact that certain payments from certain months were not, in fact, made, and that Mr. Hall, after demanded to do so, did not make those payments as part of his obligation under the personal guarantee.
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> Mr. Hall has not submitted any affidavits in opposition to . . . that motion for summary judgment. He further has not offered any reference to any deposition testimony that he might argue would raise any genuine issue of material fact as to those underlying facts that I've just described.
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> He has argued that he's unable to fairly respond at this hearing to the argument made by the [trust], but the argument made by the [trust] is the same argument made in the moving papers which Mr. Hall has had for approximately two and a half months in his possession, and has had time, therefore, to consider those in a written form, which is his argument that he needs to be able to do so with his various difficulties.
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> So the Court, while trying to balance the various competing issues here involving Mr. Hall's disabilities as described in his various papers that have been filed this week against his responsibilities as a pro se litigant, and the Court's responsibilities to measure those matters in the same way if they were raised by a represented party.
>
> The Court, therefore, concludes that on this record there is the evidence in the record to indicate that there is no genuine issue of material fact as to whether or not Mr. Hall is liable to the trust in the amounts stated and based upon the accrued interest.

As noted by the district court, the trust filed two affidavits in support of its motion for summary judgment. The first affidavit, submitted by Edwin Rector, the trustee, outlines the rent-to-own contracts and details the payments that were thirty days or more past due. The second affidavit, submitted by the trust's attorney, contains an exhibit of a transcript taken from a deposition of Hall, along with several exhibits used during that deposition. The exhibits from the

deposition are various contracts signed by Hall, including the personal guarantee, and are also attached to the affidavit.

Contrary to Hall's conclusory assertion that a genuine issue of material fact exists in this case, there are no controverted facts surrounding the rent-to-own contracts, Hall's sale of those contracts to the trust, the personal guarantee signed by Hall, or the amounts past due pursuant to the rent-to-own contracts. Although Hall has provided a wealth of information regarding his various physical and mental afflictions, he has failed to raise a genuine issue of material fact regarding the district court's grant of summary judgment. Based on an independent review of the record, we conclude the trust was entitled to summary judgment because no genuine issue of material fact existed and, therefore, the trust was entitled to judgment as a matter of law.

B. Miscellaneous Issues

On appeal, Hall asserts a variety of additional claims, most of which involve his physical and mental afflictions and the Americans with Disabilities Act (ADA). We will address each of Hall's arguments in turn.

1. Auxiliary aids

Hall asserts that he was denied auxiliary aids and, therefore, denied access to the court in violation of the ADA. The trust counters that this claim is not appealable absent an adverse ruling by the district court, is insufficient to reverse the district court's grant of summary judgment, and is moot.

Hall contends that he filed two motions with the district court requesting to be provided with auxiliary aids "for all meetings and legal proceedings from this day forward." However, Hall's two motions for auxiliary aids were filed on October 11 and October 15, 2007. As noted by the trust, these motions were filed *after* the hearing in which summary judgment was granted.

The record contains a minute entry and order from November 21, 2007. That minute entry and order reflects that the parties again came before the district court after the summary judgment hearing to address Hall's motion to stay proceedings, amended motion to change venue, motion to stay proceedings while he was out of area, amended motion to stay proceedings, motion to combine motions, motion to enlarge time, motion for trial, and motion for auxiliary aids. The minute entry and order reflects that the hearing took place on November 1, 2007. However, Hall has failed to include a transcript from that hearing in the record on appeal. It is the responsibility of the appellant to provide a sufficient record to substantiate his or her

claims on appeal. *Powell v. Sellers*, 130 Idaho 122, 127, 937 P.2d 434, 439 (Ct. App. 1997). In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error. *Id.*

Furthermore, with respect to Hall's claim regarding auxiliary aids, the district court's minute entry and order states that "the Court advised that issue[s] [involving] the Americans with Disability Act shall be handled by the Trial Court Administrator. Therefore, there will be no action taken by the Court on this motion." As Idaho's Supreme Court has noted, "[w]e will not review an alleged error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error." *De Los Santos v. J.R. Simplot Company, Inc.*, 126 Idaho 963, 969, 895 P.2d 564, 570 (1995). There is no adverse ruling by the district court regarding Hall's request for auxiliary aids, thus providing an additional reason why his claim on appeal fails. Therefore, we will not address the issue further.

2. Discovery motion related to attorney fees

Hall asserts that he was denied discovery of information regarding the trust's calculation of attorney fees. The minute entry and order reflecting the hearing that occurred on November 1, 2007, provided that Hall would have until November 21, 2007, "to pursue any further discovery as to the Plaintiff's Motion for Attorney Fees and Costs and to file any objection to the Plaintiff's Motion for Attorney Fees and Costs." That order also provided that a hearing on the trust's motion for attorney fees and costs was scheduled for December 18, 2007. Again, Hall has failed to include the transcripts from the hearings on November 1 and December 18 in the record on appeal. The record contains a notice of service to Hall regarding interrogatories and requests for more definite statements from the trust. According to the trust's brief on appeal, this notice provided proof that Hall was granted access to discovery of the trust's calculation of attorney fees and costs. Furthermore, there is nothing in the record reflecting an adverse order from the district court regarding Hall's discovery motion related to attorney fees. *See De Los Santos*, 126 Idaho at 969, 895 P.2d at 570 (noting that "[w]e will not review an alleged error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error"). Therefore, Hall's claim on this issue fails on appeal.

3. Venue

Hall asserts that the district court "abused discretion in not allowing me 'excusable neglect' in determining change to proper venue." In support of this claim on appeal, Hall's brief

says only that he moved for a change of venue as soon as he was able to do so and that venue at the Bannock County Courthouse imposed unreasonable demands on his health because he was forced to travel two hours round trip to attend hearings. The trust counters that the district court properly exercised its discretion in denying Hall's motion for a change of venue and that his motion was untimely.

The decision to grant or deny a motion for a change of venue is left to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of that discretion. *Robinson v. White*, 90 Idaho 548, 551, 414 P.2d 666, 669 (1966). The district court entered an order denying Hall's change of venue motion, which began by quoting I.R.C.P. 40(e). That rule provides, in pertinent part:

> (1) Judge or magistrate may grant a change of venue or change the place of trial to another county in any civil action as provided by statute, and the judge or magistrate must, on motion pursuant to Rule 12(b), change the venue of a trial when it appears by affidavit or other satisfactory proof:
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> (A) That the county designated in the complaint is not the proper county, which motion must be made no later than fourteen (14) days after the party files a responsive pleading . . . .

After quoting I.R.C.P. 40(e), the district court's order concluded:

> Here, Hall raised the issue of venue in paragraph 2 of his Answer, "It is well known that at all times [Hall] has lived in Pingree, Idaho, in Bingham County and that the contract in question originated in Bingham County, and that the referred trailer houses are in Bingham County and that this is a matter for the Bingham County Courts to have authority over. Therefore I demand that this matter be brought before Bingham County Courts according to the law."
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> Idaho Rule of Civil Procedure 12(b) states that "Every defense, in law or fact, to a claim for relief in any pleading… [sic] shall be asserted in the responsive pleading thereto if one is required, except that the following defenses shall be made by motion: (3) Improper Venue, (4) Insufficiency of Process, (5) Insufficiency of Service of Process…[sic]" *IRCP 12(b).*
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> Construing paragraph 2 of Hall's Answer as a Motion for Change of Venue, and accounting for the later filed Motion to Change Venue, filed on July 27, 2007, the Court denies the Motion. Even if Bingham County is the proper venue for this action, and the Court makes no determination on this record, the Motion to Change Venue was not filed within 14 days of [Hall's] Answer. The Trust filed a Summons and Complaint on September 1, 2006[,] and [Hall] "responded" on November 22, 2006. [Hall] did not file the Motion to Dismiss or the Motion to Change Venue until July 27, 2007, well past the 14 day time limit found in Rule 40(e). Further the Motion was not supported by affidavit or other satisfactory proof as to the claim of residence.

Because Hall's motion for a change of venue was untimely and unsupported by an affidavit or other proof, we conclude the district court did not abuse its discretion in denying that motion.

After Hall's change of venue motion was denied, he filed an amended motion to change venue. Hall's amended motion for a change of venue was addressed at the November 1, 2007, hearing. The district court's minute entry and order denied Hall's "Amended Motion to Change Venue for the reasons stated on the record in open court." Again, that transcript is not in our record. In the absence of an adequate record on appeal to support Hall's claim regarding the denial of his amended motion to change venue, we will not presume the district court erred. *See Powell*, 130 Idaho at 127, 937 P.2d at 439.

4. Jury trial

Hall argues that he was denied his right to a jury trial. The trust counters that Hall's motion for trial was untimely and that there were no issues left for a jury trial after the district court's grant of summary judgment.

Hall's motion for a jury trial was addressed at the November 1, 2007, hearing. Again, Hall has failed to include the transcript from that hearing in the record on appeal. However, the district court's minute entry and order provided:

> [Hall] provided argument for his Motion for Trial. [Hall] also made an oral Motion for Reconsideration. Counsel for the [trust] objected to the Motion and provided argument.
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> The Court advised that the right to a jury trail is waived because no timely demand for a jury trial was made. The Court DENIED the Motion for Trial for the reasons stated from the bench. The Court advised that the Motion for Reconsideration is untimely on the particular facts of the case and denied said Motion [for] the reasons described in open court.

Despite the untimeliness of Hall's motion requesting a jury trial, the district court appears to have entertained it. In the absence of an adequate record on appeal to support Hall's claim regarding the denial of his motion for trial, we will not presume the district court erred. *See Powell*, 130 Idaho at 127, 937 P.2d at 439. Furthermore, where, as here, there are no genuine issues of material fact to be decided, the granting of summary judgment will not result in depriving a party of any constitutional right to a trial by jury. *Gage v. Harris*, 119 Idaho 451,

453, 807 P.2d 1289, 1291 (Ct. App. 1991). Therefore, Hall's claim that he was deprived of his right to a jury trial is without merit.

5. Pro se litigants, due process, and equal protection

Hall asserts that he cannot be held to the same standards as an attorney, citing 42 U.S.C. 12112, and that he was denied due process and equal protection because of his disabilities. Pro se litigants are held to the same standards and rules as those represented by an attorney. *Suitts v. Nix*, 141 Idaho 706, 709, 117 P.3d 120, 123 (2005). Furthermore, 42 U.S.C. 12112 prohibits discriminatory practices in the employment context and does not apply in this context.

Hall asserts that he was denied due process and equal protection at the summary judgment hearing because he "was categorically denied the right to be heard." However, contrary to Hall's claim, the district court provided Hall many opportunities to be heard at that hearing. Furthermore, the district court aided Hall by summarizing the trust's arguments and repeating them back to Hall so that he could respond. Hall has not demonstrated that he was denied due process or equal protection in this case.

Although Hall has presented evidence of several disabilities, the record demonstrates that the district court allowed Hall many opportunities to present his case and be heard both at the summary judgment proceedings and at later hearings on Hall's various motions. Hall has failed to allege, much less establish, a genuine issue of material fact. Although Hall may well be a sympathetic defendant, he is not excused from compliance with the rules of civil procedure.

C. Attorney Fees and Costs on Appeal

The trust asserts it is entitled to attorney fees and costs on appeal pursuant to I.C. § 12-121. An award of attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party and such an award is appropriate when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Rendon v. Paskett*, 126 Idaho 944, 945, 894 P.2d 775, 776 (Ct. App. 1995). Although several of Hall's claims and arguments on appeal are misguided, we cannot conclude that his appeal was frivolous. Therefore, we decline to award the trust attorney fees on appeal. However, the trust is entitled to costs as the prevailing party.

IV.

CONCLUSION

Hall has not raised a genuine issue of material fact and, therefore, the trust was entitled to summary judgment as a matter of law. Hall's motions regarding auxiliary aids did not receive an adverse ruling by the district court and are moot. Hall was not denied discovery of attorney fees. Hall's motion for a change of venue was untimely. Hall was not denied the right to a jury trial, due process, or equal protection. Accordingly, the district court's order granting summary judgment to the trust is affirmed. We decline to award attorney fees on appeal, but the trust is entitled to costs as the prevailing party.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**